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In The

Supreme Court of the United States

October Term, 1996

TEXAS MANUFACTURED HOUSING ASSOCIATION, INC. and A.J. WALLER, SR.,

Petitioners,

vs.

CITY OF NEDERLAND and ZONING BOARD OF APPEALS OF THE CITY OF NEDERLAND,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION OF THE MANUFACTURED HOUSING INSTITUTE FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION AND BRIEF *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

The Manufactured Housing Institute (MHI) respectfully moves this Court, pursuant to Supreme Court Rule 37.2, for leave to file the brief submitted herewith, as *amicus curiae* in support of Petitioners Texas Manufactured Housing Association, Inc. and A.J. Waller, Sr.'s Petition for a Writ of Certiorari. Petitioners have consented to the filing of this brief, but Respondents have withheld consent.[1] A copy of the proposed *amicus curiae* brief is attached.

The *amicus* Manufactured Housing Institute (MHI) is an Illinois not-for-profit corporation headquartered in Arlington, Virginia, which represents manufacturers, suppliers, retailers, lenders, community owners, state manufactured housing associations, and private third party inspection agencies nationwide — all segments of the manufactured housing industry. The Petitioner, the Texas Manufactured Housing Association (TMHA), is a state manufactured housing association member of MHI. MHI currently represents associations in 48 states. MHI's membership produces approximately seventy percent (70%) of the total production of the industry.[2]

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1. Petitioners have consented to the filing of this brief of the Manufactured Housing Institute as *amicus curiae*, which consent is on file with the Court. In response to a request for consent by Respondents to the submission of this *amicus curiae* brief, Respondents' counsel replied by letter dated May 14, 1997 "[w]e are not aware of any relevant matter not already brought to the attention of the Supreme Court, we strongly disagree with the matters raised in your Petition for Writ to the Supreme Court, and we do not give our consent for an *amicus* brief when it would serve no purpose at this stage of the proceedings."

2. Information gathered by the National Conference of States on Building Codes and Standards.

Because MHI was involved in the development of a voluntary national industry standards and inspection system prior to the passage of the National Manufactured Housing Construction and Safety Standards Act (NMHCSSA) as well as with the passage of the NMHCSSA, MHI is in a unique position to provide the Court with the historical perspective on the inclusion in the NMHCSSA of the express preemption provision. MHI is also well-positioned to address the questions presented in the Petition for a Writ of Certiorari from the broad industry perspective, not provided in the Petitioners' brief.

MHI is submitting this Brief because of its concern for the adverse impact that the Fifth Circuit Court of Appeals' ruling will have on the ability of a large class of consumer-citizens to become homeowners, and on the ability of the industry to continue to produce affordable housing. In 1996 one out of three new single family homes purchased was a manufactured home.[3] Because of the nationwide production and shipment of manufactured homes, it is vital to preserve the uniformity and consistency of the Federal standards to provide the nation's only non-subsidized affordable housing.

MHI believes this *amicus curiae* brief can assist the Court in ascertaining the national adverse impact of the Fifth Circuit's ruling on the manufactured housing industry, with respect to both the preservation of Federal preemption and the Commerce Clause. The Fifth Circuit's decision seriously undermines the industry's national production and shipment of manufactured homes, as well as the Federal standards and enforcement system, which runs counter to the intent of Congress. The Fifth Circuit decision will adversely affect the entire industry and the Nation's housing stock by increasing the cost of manufactured housing and reducing its availability.

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3. Manufactured Housing Institute, *Customer Demand Pushing Record Industry Shipments*, Housing Currents (Winter 1997).

As one of the National Partners in Homeownership, coordinated by the United States Department of Housing and Urban Development (HUD), MHI has worked with the other partners and HUD to identify ways to eliminate barriers to the expanded use of affordable housing, which specifically includes manufactured homes. Through this effort, MHI has a strong interest in the negative impact that the Fifth Circuit's decision upholding Nederland's exclusionary ordinance has on accomplishing this objective. In HUD's recent *Manufactured Housing: Statement of Policy 1997-1, State and Local Zoning Determinations Involving HUD-Code*, at 62 Fed. Reg. 24337 (May 5, 1997) (App. B), HUD emphasizes the importance of manufactured housing in meeting its partnership effort to increase homeownership. HUD explicitly states that it issued the *Statement of Policy* "as an initial step in the elimination of barriers to the use of manufactured housing and in furtherance of the goals and objectives of the National Homeownership Strategy." *Id.* This recent *Statement of Policy*, in addition to HUD's prior *Notice of Internal Guidance on Preemption*, 62 Fed. Reg. 3456 (Jan. 23, 1997) (App. A), which are discussed in MHI's *amicus* brief, set forth HUD's interpretation of the preemptive provision in the NMHCSSA and directly address the type of discrimination against HUD Code manufactured housing practiced in the City of Nederland. Neither of these recent HUD preemption interpretations were discussed in the Petitioners' brief.

In light of the foregoing, it is respectfully requested that this Court grant leave to file the attached brief of the MHI *amicus*.

Respectfully submitted,

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BRIEF OF THE MANUFACTURED HOUSING INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Manufactured Housing Institute[1] submits this brief as *amicus curiae*, and respectfully suggests that this Court grant the Petition, and reverse the decision below.

STATEMENT OF INTEREST

MHI, a national trade association represents all aspects of the manufactured housing industry, with associations in 48 states. Its member manufacturers produce approximately seventy percent (70%) of the total industry production.

MHI is able to provide this Court with its broad industry and historical perspective, not provided in the Petitioners' brief. MHI, in existence since 1936, was involved in the development of a national industry standards and inspection system prior to the passage of the National Manufactured Housing Construction and Safety Standards Act of 1974 (NMHCSSA) as well as with the passage of the NMHCSSA. 42 U.S.C. §§ 5401-5426.

The Fifth Circuit Court of Appeals' decision seriously undercuts this national system. It allows state and local governments to impose standards on manufactured homes that differ from the Federal standards, in contravention of the express preemption provision in the NMHCSSA. The opinion goes against the intent of Congress as revealed by the NMHCSSA's legislative history and the regulatory framework for enforcing the standards promulgated and administered by the United States Department of Housing and Urban Development (HUD) in 24 C.F.R. Part 3282. As well, the

1. Counsel for a party did not author this brief in whole or in part and no person or entity, other than the *amicus curiae*, its members, or counsel have made a monetary contribution to the preparation or submission of the brief.

decision seriously interferes with interstate commerce, promoting intrastate modular and site-built housing at the expense of the interstate manufactured housing industry.

MHI, on behalf of its members, believes that the maintenance and preservation of the Federal standards and enforcement system is of vital importance to the entire industry and the nation's homebuyers. Such importance is revealed by the vast interstate nature of the industry. There are a total of 313 home manufacturing plants in 33 of the 50 states with homes being shipped to all 50 states.[2] In 1996, the industry produced and shipped over 363,000 manufactured homes.[3] The retail sales of the industry are estimated by MHI to be $14 billion dollars.[4] Homes are often produced in one state and sold and installed in another state pursuant to the preemptive Federal standards and enforcement system promulgated by HUD and pursuant to the mandates of the NMHCSSA. This unique Federal program provides uniformity where chaos reigned prior to the passage of the NMHCSSA. This uniformity, provided by Federal preemption for safety and construction standards, is a key component in the affordability of manufactured homes. Unlike other types of housing which must comply with the various differing local codes, manufactured homes comply with only one national code.

MHI is particularly concerned that the Fifth Circuit's opinion provides a loophole for state and local governments to contravene the express intent of Congress. The Fifth Circuit decision allows state and local governments to include modular homes (factory-built homes that meet local building codes) and site-built homes

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2. Manufactured Housing Institute, *Manufacturing Report*, 23-24 (Dec. 1996).

3. *Id.* at 2.

4. Derived by multiplying the total number of 1996 shipments by the total average sales price of $38,500 per home.

(constructed to local building codes) while excluding manufactured homes (factory-built homes that comply with the HUD Code) from their municipal housing plans. While there is no meaningful aesthetic distinction between modular homes and manufactured homes, this decision creates a zoning scheme which would undercut the Federal regulatory program essential to the provision of quality, affordable homes manufactured throughout the nation. The danger is that states and localities will have the incentive and the means to enact such zoning plans in contravention of the preemption clause of the NMHCSSA.

In addition, such a zoning scheme results in increased housing costs which solely benefit the modular housing industry, an intrastate industry, at the expense of the manufactured housing industry, an interstate industry. Such a result would completely thwart the Commerce Clause of the Constitution and the express intent of Congress in the NMHCSSA.

SUMMARY OF ARGUMENT

The Fifth Circuit Court of Appeals' ruling undermines the express preemption provision of the National Manufactured Housing Construction and Safety Standards Act of 1974 (NMHCSSA). The court erred in its application of the law by failing to rule that the ordinance effectively establishes a local standard in direct contravention of the intent of Congress. The Fifth Circuit's ruling also abrogates the Commerce Clause of the Constitution in upholding a municipal ordinance that has disproportionate and unmitigated adverse effects on interstate commerce.

After a long history of differing state and local industry standards for manufactured housing, Congress established an expressly preemptive statute to provide uniformity. The Federal standards adopted by the Department of Housing and Urban Development are performance-based, and are enforced through an extensive regulatory system of review, inspection and oversight.

The preemptive nature of the NMHCSSA was no accident, but rather a concerted effort on the part of Congress to ensure that Federal standards would be paramount in manufactured housing.

The Fifth Circuit misapplied case law and the provisions of the NMHCSSA in its ruling. The express preemption provision dictates that a locality cannot impose a different standard on manufactured housing. The Fifth Circuit found that because the Nederland ordinance did not by its own language show a conflict with the Federal standards, it was not preempted. However, the Fifth Circuit erred in requiring a conflict to be expressly linked to the language of an ordinance. Such a clear statement of intent is not a prerequisite to preemption. The preemptive provision of the NMHCSSA does not provide that intent is in any way relevant to the determination of whether a state has established a standard different from the Federal standards. As well, the Fifth Circuit's interpretation directly conflicts with the Eleventh Circuit's established interpretation that the effects of regulation are relevant in determining whether preemption applies. *Scurlock v. City of Lynn Haven*, 858 F.2d 1521 (11th Cir. 1988). After the Fifth Circuit decision was issued, HUD issued preemption guidelines which address its interpretation of local ordinances, such as Nederland's, and deems them to be preempted by the NMHCSSA. States and municipalities cannot be allowed to circumvent the intent of Congress by promulgating a zoning ordinance that on its face does not impose state or local standards on manufactured homes, but by the ordinance's application does impose differing standards on the construction and safety of manufactured homes.

The Fifth Circuit also erred in its analysis of the Commerce Clause. The court found that the zoning ordinance was by its language neutral because manufactured homes are manufactured in Texas and the legislature did not foreclose the possibility of modular homes being manufactured outside of Texas. However, this ruling ignores the actual effects of the ordinance and directly conflicts with precedents established by this Court. The zoning

ordinance has a discriminatory effect; it favors the local modular housing industry at the expense of the interstate manufactured housing industry and imposes an unconstitutional burden on interstate commerce.

In addition, if the Fifth Circuit is found to be correct in applying the *Pike v. Bruce Church*, 397 U.S. 137 (1970), balancing test to determine if there is a violation of the Dormant Commerce Clause, it misapplied this test. The Fifth Circuit did not require Nederland to show an absence of less burdensome alternatives and that the local benefits were great enough to offset the substantial economic burdens imposed on interstate commerce.

The Fifth Circuit's analysis of preemption and the Commerce Clause thwarts Congress' establishment of uniform Federal standards for manufactured housing. The United States Supreme Court should look to its prior rulings that recognize the importance of upholding Congress' intent and of maintaining the freedom of interstate commerce. It should not let stand a ruling that adversely impacts the affordability of housing for a large population of low and moderate income families that Congress explicitly intended to benefit.

ARGUMENT

I.

THE FIFTH CIRCUIT ERRED BY FAILING TO HOLD THAT ORDINANCE 259 EFFECTIVELY ESTABLISHES A LOCAL STANDARD IN CONTRAVENTION OF THE EXPRESS PREEMPTION OF THE NMHCSSA.

The National Manufactured Housing Construction and Safety Standards Act of 1974 (NMHCSSA) contains an express preemption provision, which indicates clear Congressional intent to establish Federal manufactured housing standards (the HUD

Code) and an accompanying enforcement system that overrides state and local manufactured housing standards. 42 U.S.C. § 5403(d). Such an explicit provision is distinct from the other forms of preemption recognized under Federal law. The legislative history of the NMHCSSA and the regulatory framework adopted by HUD to implement the NMHCSSA demonstrate both the reasons for adopting this Federal preemptive system and the importance of maintaining it. HUD has established in its regulations and guidelines interpreting the Act's express preemption, that a locality lacks authority to exclude manufactured homes through zoning enforcement that is based on a local code different from the HUD Code. Thus, the Fifth Circuit erred in refusing to examine whether the ordinance has the effect of imposing different standards on HUD Code factory-built homes, which is preempted by the Act.

A. Congress Provided for Express Preemption of State and Local Law in the NMHCSSA.

In the National Manufactured Housing Construction and Safety Standards Act of 1974, Congress set forth its express intention for the Federal standards to preempt state and local law. 42 U.S.C. § 5403(d). For Congress to expressly preempt state and local law as it has in the NMHCSSA is unusual, and must be interpreted as a strong indication of Congressional intent to establish a single, Federal standard. The preemption language of the NMHCSSA is modelled after similar language in the National Traffic and Motor Vehicle Safety Act of 1966. 15 U.S.C. § 1392. In both of these cases, because of the particular interstate commerce concerns for automobiles and manufactured homes, Congress saw the need for Federal preemptive standards to provide for uniformity and rejected weaker, less restrictive options. For example, the original House version of the NMHCSSA, introduced in 1972, contained a much less comprehensive preemption clause. The House bill would have allowed state or local codes to be equal to or more stringent than the Federal standards. Senator Brock introduced similar legislation in the Senate that required state or local codes to be *only* equal to

the Federal code, and in 1973 Senator Proxmire introduced a bill that would have permitted states to adopt higher standards than the Federal code. However, the final Senate version prohibited state and local standards that were not identical to the Federal standards, but allowed state handling of any issue for which there was no Federal standard. *See* Committee on Housing and Urban Affairs, S. Doc. No. 1348, 93d Cong., 1st Sess. 1221-22 (1973). In recognition of the less mobile nature of modern factory-built homes, Congress changed the name of the "mobile home" to "manufactured home" in the NMHCSSA in 1980. National Commission on Manufactured Housing, *Final Report* 19-20 (Aug. 1, 1994).

To recognize the importance of preemption to the regulation of manufactured housing, a brief overview of the history of this regulation prior to the passage of the NMHCSSA is useful. The manufactured housing industry's origins date back to the factory-assembled travel trailers of the 1920's. Safety standards for manufactured homes did not exist in the earliest years. By the 1950's, some municipalities imposed local code requirements on manufactured homes either to improve their quality or to ban them outright. This led the industry to develop its own standards. By 1963, a standard was published by the American National Standards Institute (ANSI) in association with the manufactured housing industry and the National Fire Protection Association (NFPA). In 1969, this standard — ANSI A119.1 for Mobile Homes — Body and Frame Design and Construction: Installation of Plumbing, Heating, and Electrical Systems — was expanded to include body and frame construction provisions. Arthur D. Bernhardt, *Building Tomorrow: The Mobile/Manufactured Housing Industry* 377 (1980).

Amicus Manufactured Housing Institute (MHI), formerly the Mobile Home Manufacturers Association (MHMA), required its members to comply with ANSI A119.1, and had inspectors conducting in-plant inspections. The *amicus* also encouraged states to recognize and adopt ANSI A119.1. *Final Report* at 19. By 1974, 45 states had adopted some version of the ANSI standards. However,

there was a wide variance in these state standards. Besides the lack of uniformity in the state standards, there was also a vast difference in the state enforcement programs. Some states, like California and North Carolina, had effective enforcement programs while some had no inspection or enforcement mechanism. *Id.* As pointed out by the National Manufactured Housing Commission:

> State-by-State variations made it difficult for the industry to build homes that were uniform and prevented full interstate reciprocity. Multiple inspections of the same unit raised costs, and in up to 10 states no regulations at all governed manufactured home construction.

Id. In the early 1970's consumer organizations, particularly Ralph Nader's Center for Auto Safety, began to call for "stricter and more uniform" manufactured home standards. *Id.*

The National Manufactured Housing Construction and Safety Standards Act of 1974 mandated that the HUD Secretary adopt Federal preemptive standards that are "reasonable and shall meet the highest standards of protection, taking into account existing State and local laws relating to manufactured home safety and construction." 42 U.S.C. § 5403(a). HUD was also charged by Congress with establishing a Federal enforcement program to guarantee compliance.

The members of *amicus* Manufactured Housing Institute looked to Federal preemption to provide a single set of construction standards by which to build homes anywhere in the United States, so no different or more stringent requirements could be placed on them in different states. With such standards' uniformity, the cost of manufacturing is reduced, providing more affordability for homebuyers. Federal preemption meant that the homes could be marketed cost-effectively nationwide. As outlined in the Federal standards, 24 C.F.R. § 3280.1, the preemptive code, to the maximum

extent possible, is performance-based. The members of the *amicus* view such a code as encouraging innovation and use of different materials and techniques, which also contribute to affordability.

The express preemption of state and local law in the NMHCSSA was created purposely by Congress to provide the uniformity requisite to nationwide delivery of affordable, safe and high quality manufactured homes. This Court should not allow a decision to stand that permits a local ordinance to contravene the Federal law.

B. HUD Has Established a Preemptive Regulatory System Which Prohibits Zoning Ordinances from Imposing Different Standards.

In 1976, HUD promulgated Manufactured Home Procedural and Enforcement Regulations, 24 C.F.R. § 3282. Section 3282.11 of these regulations expressly provides for preemption of state and local standards which conflict with the Federal standards. *See* 24 C.F.R. §§ 3282.11(c) and (d). HUD's regulations clearly prohibit any state or local action that "impair[s] the Federal superintendence of the manufactured home industry." 24 C.F.R. § 3282.11(d).

HUD stated its preemptive intent even more clearly in its recent *Notice of Internal Guidance on Preemption*, 62 Fed. Reg. 3456 (Jan. 23, 1997) (App. A), and its *Manufactured Housing: Statement of Policy 1997-1, State and Local Zoning Determinations Involving HUD-Code*, 62 Fed. Reg. 24337 (May 5, 1997) (App. B). On January 23, 1997, subsequent to the Fifth Circuit decision in this case, HUD issued its *Notice of Internal Guidance on Preemption* in order to assist the HUD staff in answering questions from the public, including state and local governments, as to whether particular state or local laws are preempted by the NMHCSSA. HUD's guidelines devote section B to addressing zoning issues. In general, the guidelines provide that while state and local governments have the power to determine appropriate land use,

they are prohibited from discriminatory exclusion of manufactured homes in the way that the City of Nederland's ordinance is applied:

> If a locality, however, is attempting to regulate, and even exclude, certain manufactured homes through zoning enforcement that is based solely on a construction and safety code different from that prescribed by the Act, the locality lacks such authority. Thus, a locality cannot accept structures meeting the Federal definition of manufactured homes which comply with different standards, such as the local or State Building Code, and exclude or restrict manufactured homes that are the same but only meet the Federal standards. By excluding or restricting only manufactured homes built to the Federal standards, and accepting manufactured homes built to other codes, the locality is establishing standards different than the Federal standards.

Notice of Internal Guidance on Preemption, 62 Fed. Reg. at 3457 (App. A, 5a-6a).

The Petitioners' brought forth testimony of the City's own officials showing that the City's interpretation of its ordinance would require manufactured homes to comply with the local building code. (R. 1643-44). Ordinance 259's broad definition of "trailer coach" can also be read to encompass modular/industrialized housing as defined under Texas law. By specifically providing for a means for industrialized/modular homes to be excluded from the coverage of the Act, Congress and HUD recognize that such homes are manufactured homes as defined by the Act. 42 U.S.C. § 5403(h) and 24 C.F.R. § 3282.12. The Fifth Circuit attempts to distinguish manufactured housing from modular housing by stating that "modular housing is not built on a permanent chassis and must be

constructed according to local building code standards" by citing to the Texas statutory definition. *Texas Manufactured Housing Association (TMHA) v. City of Nederland*, 101 F.3d 1095, 1099 (5th Cir. 1996). However, only one part of the two cited factors is found in this definition — "must be constructed according to local building code standards." *Id.* There is no prohibition in the Texas statute against building an industrialized/modular home on a permanent chassis. Therefore, HUD Code manufactured homes to be installed on permanent foundation systems fall under the definition of industrialized housing with the sole exception that they are constructed to a different standard.

The City of Nederland accepts factory-built housing that complies with its local building code and excludes factory-built housing that is built to the HUD Code. The HUD guidelines expressly provide that this zoning is preempted by the NMHCSSA because "the locality is establishing standards different than the Federal standards." *Notice of Internal Guidance on Preemption*, 62 Fed. Reg. at 3457. (App. A, 6a).

HUD also interprets the NMHCSSA as preempting zoning ordinances like the City of Nederland's in its *Statement of Policy*. HUD first explains its strong purpose "to identify and promote ways to increase homeownership and the supply of affordable housing" and specifically to encourage local governments to make sites available "for manufactured housing outside of parks and largely rural areas." *Statement of Policy*, 62 Fed. Reg. at 24337 (App. B, 13a). HUD's regulations are clearly intended to promote the affordability of manufactured homes by maintaining the uniform Federal standards. HUD then quoted the relevant preemptive provisions in the NMHCSSA, and set forth its interpretation:

> [T]he locality is without authority to regulate or exclude certain manufactured homes through zoning ordinances or enforcement decisions that are based solely on a construction and

> safety code that is different from the Federal standards prescribed under the Act.

Id. at 24338 (App. B, 15a). As well, HUD discusses an example that directly prohibits the City of Nederland's regulatory action because it establishes a standard different from the Federal standard, and because it would interfere with the Federal superintendence of the industry:

> By excluding or restricting only manufactured homes built to the Federal standards and accepting manufactured homes built to State or local codes, the locality is establishing standards for manufactured homes that are different from the Federal standards. To the extent that the provisions or enforcement of local zoning regulations require that manufactured homes meet standards other than the Federal standards for manufactured homes, those local actions are preempted by section 604(d) of the Act (42 U.S.C. 5403(d)). Furthermore, such a system of local regulation and enforcement would interfere with Federal superintendence of the manufactured home industry, in contravention of 24 C.F.R. 3282.11(d).

Id. (App. B, 16a).

The Fifth Circuit's decision contradicts the express will of Congress and HUD and the Eleventh Circuit's *Scurlock* decision, 858 F.2d 1521 (11th Cir. 1988). If the Fifth Circuit's ruling is allowed to stand, each and every locality could readily avoid the express preemption provision of the NMHCSSA simply by not stating any linkage to the Federal standards in the local ordinance, but by imposing the local code on manufactured homes through its

enforcement system. Such a result would fly in the face of the NMHCSSA and the President's National Homeownership Strategy objective "of the elimination of barriers to the expanded use of affordable housing, including manufactured homes." *Statement of Policy*, 62 Fed. Reg. at 24337 (App. B, 13a).

C. The Fifth Circuit Failed to Consider the Ordinance's Effects Which are Expressly Preempted by Congress.

The Fifth Circuit rejected the Petitioners' claim that Nederland's Ordinance 259 was preempted by the NMHCSSA. Instead, the court found that Ordinance 259, which prohibits "trailer coaches" from being sited outside "trailer parks," does not impose local construction and safety standards on manufactured homes. *TMHA*, 101 F.3d at 1100. The court held that Petitioners' failure to identify the particular local building code standards which the HUD Code manufactured homes did not meet was fatal to their claim. *Id.*

The Fifth Circuit distinguished its decision from the Eleventh Circuit's decision in *Scurlock*, 858 F.2d 1521. The Fifth Circuit determined that "this case is significantly unlike *Scurlock*." *TMHA*, 101 F.3d at 1100. The Fifth Circuit focused on the fact that the zoning ordinance in the *Scurlock* case expressly excluded homes that did not meet the building code. *Id.* Since the ordinance at issue here does not expressly differentiate between homes that meet the local building code and homes that do not, the court found there was no genuine issue of material fact regarding preemption. The court refused to go beyond the face of the statute to examine whether the City's regulatory scheme has the *effect* of imposing different standards on HUD Code homes.

The Fifth Circuit erred when it focused on the express language of the statute and its putative "locational" purpose. The City of Nederland interpreted the outdated term "trailer" in its ordinance to include manufactured homes, but not to include modular homes.

Modular housing is not barred from residential districts, even though they are factory-built homes, identical to manufactured homes except that they comply with the local building code instead of the HUD Code. Though the zoning ordinance does not on its face distinguish between manufactured and modular homes, the HUD regulations state that the NMHCSSA preempts a state or locality from "tak[ing] any action" which "impair[s] the Federal superintendence of the manufactured housing industry as established by the Act." 24 C.F.R. § 3282.11(d). The City's enforcement of the ordinance would constitute an impermissible "action" within the meaning of the NMHCSSA's preemptive provision.

To clarify that this is the agency's intended interpretation, HUD elaborates on the meaning of its regulations. Twice in the past year HUD has expressly stated that the preemptive provisions in the NMHCSSA prohibit states and localities from excluding manufactured homes while allowing other forms of factory-built homes (*i.e.*, modular homes). *See Notice of Internal Guidance on Preemption* (App. A) and *Statement of Policy* (App. B). HUD expressly stated that the Act's preemption analysis requires looking beyond the text of the zoning ordinance to see whether it is being enforced in a manner that contravenes the purpose of the NMHCSSA and its accompanying regulations, and limits the locality's ability to discriminate against manufactured homes "through zoning ordinances or enforcement decisions." *Statement of Policy*, 62 Fed. Reg. at 24338 (App. B, 15a). Therefore, the Fifth Circuit erred as a matter of law in refusing to consider Petitioners' evidence regarding the arbitrary and discriminatory manner in which City officials enforced the ordinance.

This Court should grant Petitioners' writ of certiorari to correct the Fifth Circuit's erroneous standard of preemption and maintain Federal uniformity in accordance with Congress' intent.

II.

THE FIFTH CIRCUIT FAILED TO FOLLOW THIS COURT'S ESTABLISHED PRECEDENT BY ALLOWING A STATUTE WITH NONDISCRIMINATORY LANGUAGE TO REBUT A VALID COMMERCE CLAUSE CLAIM.

Manufactured homes are often manufactured in one state and sited in another. The 313 home manufacturing plants in 33 states ship homes in interstate commerce pursuant to the preemptive Federal manufactured housing standards and enforcement system. The express preemption set forth in the NMHCSSA is based on the express power given to Congress in the Commerce Clause of the United States Constitution. The City of Nederland's exclusionary Ordinance 259 discriminates against the interstate commerce of manufactured homes while benefiting the intrastate commerce of modular homes.

A. The Dormant Commerce Clause Plays a Critical Role for Manufactured Housing.

Unlike housing that is built to state and local building codes, manufactured homes are built to one Federal code established and administered by HUD. Therefore, manufactured homes are products of interstate commerce. The NMHCSSA was specifically enacted to establish a uniform inspection and enforcement system for manufactured homes built to a uniform code because Congress recognized that these homes were typically manufactured in one state and sited in another state. Ordinances, like the subject ordinance of the City of Nederland, that exclude manufactured homes from residential areas, make housing less affordable for many households. *Final Report*, National Commission on Manufactured Housing at 69. "The affordability of manufactured housing for the consumer dictates that States and localities revise their zoning laws to include the units where other single-family housing types are permitted." *Id.*

B. Nederland's Ordinance 259 Unconstitutionally Burdens Interstate Commerce.

The City of Nederland's Ordinance 259 discriminates in its application against manufactured homes which are built to the HUD Code and transported in interstate commerce. The Fifth Circuit failed to apply the proper analysis under the Commerce Clause, which has been set forth by this Court.

It is uncontroverted that the application of Ordinance 259 had a four-year impact upon the interstate transfer of HUD Code manufactured housing of approximately $943,000. (R. 743). Thus, the Court must determine whether the Ordinance is discriminatory. *Oregon Waste Systems, Inc. v. Dept. of Envtl. Quality*, 511 U.S. 93, 114 S. Ct. 1345, 1350 (1994). Such an examination of discrimination is not limited to an examination of the mere language of the ordinance but a factual inquiry must be made to determine if the ordinance is discriminatory because of its effect. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

The Petitioners introduced uncontroverted evidence which proved that the ordinance discriminates against interstate commerce in its effect. Ordinance 259, as it is applied by the City, makes a distinction between two types of housing — HUD Code manufactured homes and modular/industrialized housing. The HUD Code homes are manufactured both in and out of Texas. The modular/industrialized homes are made only in Texas. The Fifth Circuit's conjecture on future locations of factories is specious because such is not currently the case. There are no modular home manufacturers in the nearby state of Louisiana as hypothesized by the Fifth Circuit. *TMHA*, 101 F.3d at 1103 n.8. As applied, Ordinance 259 limits the market for HUD Code homes, to the benefit of the nearest economic alternative in the marketplace, *i.e.*, the Texas-built modular/industrialized homes. As a result of the City's application of its ordinance, out-of-state manufacturers of HUD Code manufactured housing, who ship their homes to Texas

on a regular basis (R. 702), have lost a portion of their market, while Texas manufacturers of modular/industrialized homes have been protected from out-of-state competition.

The Fifth Circuit erred in not applying the correct analysis to its examination of whether Ordinance 259 discriminates against interstate commerce in violation of the Dormant Commerce Clause. If it had applied the correct test for discrimination, it would have found that the ordinance is discriminatory in its practical effect and imposes an unconstitutional burden on interstate commerce, which protects certain in-state housing producers at the expense of the opportunity for its citizens to obtain more affordable housing from the interstate market.

C. The Fifth Circuit Misapplied the *Pike* Test.

Even if this Court finds that the Fifth Circuit was correct in using the standard established in *Pike v. Bruce Church*, 397 U.S. 137 (1970), the Fifth Circuit misapplied this standard. Under the *Pike* test, if the ordinance serves a legitimate local purpose, it will be found to be invalid if the burden imposed on interstate commerce is excessive in relation to the local benefits and the locality does not show an absence of less burdensome alternatives.

In a recent District Court case in the Eleventh Circuit, *Georgia Manufactured Housing Association v. Spalding County, Ga.*, No. 3:94-CV-51-GET (N.D. Ga., unreported, June 13, 1996), *reh'g denied,* (N.D. Ga., unreported, Feb. 6, 1997), the court did not find the ordinance to constitute "sheer economic protectionism against out-of-state commerce." However, it did find that the burden the ordinance's 4:12 roof pitch requirement placed upon manufactured homes traditionally transported in interstate commerce was "clearly excessive in relation to [its] putative local benefits." *Id.* at 21 (*quoting Pike v. Bruce Church*, at 142). The court went on to recognize that the 4:12 roof pitch requirement caused significant problems for manufactured home manufacturers both within and

outside of the state, and threatened "to significantly increase the cost of manufactured homes not only to members of the industry but also to the purchasing public." It found the aesthetic and compatibility value of 4:12 pitched roofs to be "minimal at best." *Id.* In denying Spalding County's motion for rehearing, the District Court explicitly rejected the Fifth Circuit's Commerce Clause test in Petitioners' case stating that:

> [I]n this circuit, however, when a challenged regulation imposes substantial economic burdens on both intrastate and interstate commerce . . . , the local benefits of enforcing the regulation must be great before the regulation will be found to be valid.

Georgia Manufactured Housing Association v. Spalding County, Ga., reh'g denied, No. 3:94-CV-51-GET at 7 (N.D. Ga., unreported, Feb. 6, 1997) (*citing National Solid Waste Management Ass'n v. Alabama Dept. of Envtl. Management*, 910 F.2d 713, 725 (11th Cir. 1990)).

In Petitioners' case, the application of the *Pike* test necessitates a factual evaluation. Summary judgment was clearly inappropriate to dispose of the Petitioners' Dormant Commerce Clause challenge.

CONCLUSION

The NMHCSSA is unique in that it contains an express preemption provision which prohibits states and localities from establishing construction and safety standards applicable to manufactured homes which are not identical to the Federal standards. 42 U.S.C. § 5403(d). The Fifth Circuit's decision creates a wide loophole which allows a locality, such as Nederland, to thwart the intent of Congress by promulgating an ordinance that displays no conflict in the mere reading of its language, regardless of its effect. The Fifth Circuit erred in not analyzing the effects of

the Nederland ordinance. This Court should look to the Eleventh Circuit's decision in *Scurlock* and to HUD's own interpretations of the Act's preemption, which have concluded that the preemption analysis should not be based just on the language of the ordinance, but also on whether it is applied and enforced in a manner that contravenes the Act. When the effects of Ordinance 259 are analyzed, it must be held to be preempted as presenting the exact situation that is specifically described by HUD in its *Guidance on Preemption* and *Statement of Policy*. (App. A and App. B).

The Dormant Commerce Clause plays a critical role in ensuring the affordability and availability of manufactured housing to the Nation's consumers by prohibiting states from unjustifiably discriminating against interstate commerce. Nederland's Ordinance 259 unconstitutionally burdens interstate commerce as it affects manufactured housing and should not be allowed to stand. The Fifth Circuit failed to apply the correct analysis as established by this Court in *Oregon Waste Systems* and *Hughes* for determining discrimination by failing to determine if the ordinance is discriminatory by its effect. *Oregon*, 114 S. Ct. at 1350; *Hughes*, 441 U.S. at 336. Ordinance 259 discriminates as applied because the City makes a distinction between HUD Code homes, which are produced both in-state and out-of-state, and industrialized/ modular homes, which are only produced and sold in-state.

The Fifth Circuit went on to misapply the *Pike* test, which necessitates a factual evaluation.

To allow the Fifth Circuit's ruling to stand would dramatically thwart the intent of Congress to provide a uniform Federal standard for manufactured housing, and would seriously impact the availability of affordable housing to low and moderate income families that Congress desired to preserve.

For the foregoing reasons, and for the reasons set forth in the

Petition for a Writ of Certiorari, this Court should grant the Petition, and reverse the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX A — FEDERAL REGISTER DATED JANUARY 23, 1997 (VOLUME 62, NUMBER 15)

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 3282

[Docket No. FR-4192-N-01]

Manufactured Housing Construction and Safety Standards: Notice of Internal Guidance on Preemption

AGENCY: Office of the Assistant Secretary for Housing — Federal Housing Commissioner, HUD.

ACTION: Notice of staff guidance.

SUMMARY: The Office of Consumer and Regulatory Affairs in HUD has developed guidelines to assist its staff in addressing preemption issues concerning the National Manufactured Housing Construction and Safety Standards Act of 1974. Because of the interest of outside persons in the subject generally, HUD has decided to publish these internal guidelines to assist regulated entities and consumers in understanding the guidelines under which HUD will be operating. These guidelines are not binding on either HUD or the public and are published for informational purposes only.

FOR FURTHER INFORMATION CONTACT: David R. Williamson, Director, Office of Consumer and Regulatory Affairs, Department of Housing and Urban Development, Room 9156, 451 Seventh Street, SW., Washington, DC 20410-0500; telephone (202) 708-6401, or on e-mail through Internet at David _ R. _ Williamson@hud.gov. For hearing and speech-impaired

persons, the telephone number may be accessed via TTY (text telephone) by calling the Federal Information Relay Service at 1-800-877-8339. (Other than the "800" number, these telephone numbers are not toll-free.)

SUPPLEMENTARY INFORMATION: The staff guidelines reproduced in this notice are internal guidance to assist the HUD office administering the manufactured housing program in answering questions from the public as to whether particular State or local laws or regulations are preempted by the National Manufactured Housing Construction and Safety Standards Act of 1974 (42 U.S.C. 5401-5426) (the Act). The guidelines are based upon the Act and its implementing regulations in 24 CFR parts 3280, 3282, and 3800 and do not provide new interpretations of the Act or create new HUD policy. The guidelines were developed to assist HUD staff in giving uniform and timely responses to the public, including consumers and affected industries, and State and local governments on preemption issues.

HUD is publishing these guidelines because of the interest in preemption questions that has been expressed by members of these groups. HUD welcomes comments on these guidelines. Anyone wishing to comment on these guidelines may do so by submitting written comments to the attention of the person listed in the "For Further Information Contact" section of this notice.

The internal guidelines that were prepared are as follows:

Guidelines for Analyzing Situations Involving Preemption Under the Manufactured Home Construction and Safety Standards Act

Appendix A

I. Introduction

These guidelines have been prepared to assist in answering questions from the public as to whether particular State or local laws or regulations are preempted by the Act. These guidelines are based upon the National Manufactured Housing Construction and Safety Standards Act and its implementing regulations and are not intended to add new interpretations to the Act or to create new HUD policy.

II. Statutory And Regulatory Background

The Act establishes a national set of construction standards for manufactured housing. To ensure that State or local governments did not enact or allow to continue conflicting construction standards, Congress provided that no State or local government could establish a standard dealing with an aspect of performance that is not identical to those standards established under the Act (section 604(d)). However, where there is no Federal standard, the States are free to act (section 623(a)).

HUD has interpreted these statutory provisions in its regulations implementing the Act (24 CFR 3282.11). In accordance with the Act, the regulation bars States from imposing a manufactured home standard regarding construction and safety that covers the same aspects of performance governed by a Federal standard. More generally, States may not take any action that could interfere with the Federal superintendence of the industry as established by the Act (24 CFR 3282.11).

The Act does not impose a duty on HUD to make any determinations as to the applicability of the preemption provision, to investigate preemption issues, or to render advisory

opinions regarding preemption questions. Further, a State is not specifically prohibited under section 610 of the Act from implementing a provision that is preempted, nor is there any requirement under the Act for the Secretary to enforce the preemption provision. Generally, enforcement of preemption requirements is left up to the Courts. Where an issue is unclear, it is appropriate for the Courts to decide whether a State or local requirement is preempted.

To the extent possible, HUD wishes to be responsive to inquiries of consumers, the industry, and State or local governments on the applicability of preemption. These responses should be considered as an effort by HUD to advise the public of its construction of the statute and the rules which it administers, and to give its opinion as to the applicable law and the particular facts.

III. Guidelines for Specific Situations

Most inquiries can be responded to merely by discerning if there is a specific Federal standard which addresses the same aspect of performance as the State standard. If so, the Federal law preempts the State law. In a significant number of cases, however, the determination is not as clear and requires either an engineering or legal analysis, or both. There are four general areas of inquiry which are frequently raised:

A. Installation

There is no specific Federal standard that deals with the installation of manufactured homes. As such, standards as to the installation of manufactured homes can be regulated by local or State governments and are not preempted under the Act.

It is possible, however, that a local installation rule may hinder the implementation of Federal standards. For example, the implementation of a local rule may conflict with a requirement of a Federal construction standard for plumbing or water hookup. In such cases, the local rule is preempted.

B. Zoning

Normally, zoning issues fall outside the scope of the preemption provisions of sections 604 of the Act. There may be limited instances, however, in which the Federal definition of "manufactured home" could fall within the broad definitions applied to prefabricated or factory built homes under the local zoning ordinance. Such homes are treated differently depending on the building code under which they are constructed.

Generally, the enforcement of a local ordinance regulating the location of manufactured homes has not been subjected to the regulatory authority of the Act because such enforcement rests on the locality's right to determine proper land use. In addition, a locality is free to adopt and enforce ordinances that regulate the appearance and dimensions of homes so long as the criteria established by such ordinances do not have the effect of excluding manufactured homes based on the construction and safety standards to which they were built. Such regulation of aesthetics protects property values, preserves the character and integrity of communities and neighborhoods, and assures architectural compatibility.

If a locality, however, is attempting to regulate, and even exclude, certain manufactured homes through zoning enforcement that is based solely on a construction and safety code different from that prescribed by the Act, the locality lacks

such authority. Thus, a locality cannot accept structures meeting the Federal definition of manufactured homes which comply with different standards, such as the local or State Building Code, and exclude or restrict manufactured homes that are aesthetically the same but only meet the Federal standards. By excluding or restricting only manufactured homes built to the Federal standards, and accepting manufactured homes built to other codes, the locality is establishing standards different than the Federal standards.

A locality is not in conflict with the preemptive provisions of the Act if, without regard to construction standards, it treats all structures that meet the Federal definition of Manufactured Homes the same under local zoning laws.

C. State Enforcement

A number of questions have arisen as to when a State's enforcement of manufactured housing standards are preempted by Federal law. HUD's regulations at 24 CFR 3282.11(c) and (d) set forth a clear standard as to the appropriateness of State enforcement of its manufactured home standards. The Federal regulations prohibit a State from establishing a code enforcement system for manufactured homes which is outside, or goes beyond, those enforcement procedures specifically set forth in the Federal regulations. "The test of whether a State rule or action is valid or must give way is whether the State rule can be enforced, or the action taken, without impairing the Federal superintendence of the manufactured home industry as established by the Act" (24 CFR 3282.11(d)). There are several specific situations:

1. A State, as a State Administrative Agency (SAA) under

section 623 of the Act, can enforce the Federal standards. It may also enforce State standards which are identical to the Federal standards. Such actions would not be preempted. However, the State's system of enforcing these standards must be identical to the enforcement procedures in the Federal regulations. "No State may establish * * * procedures or requirements * * * which * * * require remedial actions which are not required by the Act and the regulations" (24 CFR 3282.11(c)).

2. A State may enforce its own consumer protection or warranty laws as to defects in individual homes. As such, a State may require a manufacturer to correct non-compliances and defects in response to individual consumer complaints. Such acts would not be preempted by Federal law (24 CFR 3282.11(d)).

3. Notwithstanding the above, however, there are limitations on a State's actions to correct individual homes. These are situations in which State action would interfere with Federal superintendence of the manufactured home industry.

(a) *Imminent safety hazards or serious defects.* Where it appears that there is an imminent safety hazard or a serious defect, the State is required to refer the matter to HUD for enforcement (24 CFR 3282.405(b) and 3282.407(a)).

(b) *Class of manufactured homes.* Where it appears that the same defect exists in a class of manufactured homes and the State is not the State in which the homes were produced, then the State is required to refer the matter to the SAA in the State in which the homes were produced or to HUD (if there is no SAA in the State of production) for enforcement. Further, if a

class of defective homes is produced in more than one state, HUD is responsible for the enforcement actions. If the homes were all manufactured in the State, the State may take actions, consistent with the Federal **regulations**, with regard to the noncompliance and defects (24 CFR 3282.405(b) and 3282.407(a)(3)).

(c) *Prior HUD enforcement.* Where HUD has already taken action to have a class of serious defects corrected, then the State is preempted from taking corrective actions of its own pursuant to the Act (24 CFR 3282.404(e)).

D. Utility Companies

There have been a few utility companies which have attempted to impose their own construction or safety standards on manufactured homes as a requirement for connection to their services. The Act, by its express terms, prohibits only "State or political subdivisions of a State" from establishing standards that conflict with the Federal standards (section 604(d)). Accordingly, if the utility company is owned or controlled by a political subdivision, its standards are preempted by the Federal standards. If the utility is privately owned, its standards would not be preempted.

E. State Construction and Safety Standards

1. *Aspects of performance.* Additional questions arise in situations in which the State or locality attempts to apply its own building or safety code to the manufactured home. Under section 604 of the Act, State law is preempted whenever there is a State performance standard regarding construction and safety that is not identical to an established Federal standard. On the

other hand, section 623 of the Act provides that Federal law does not preempt State construction or safety standards for which a Federal standard had not been established. Thus, for there to be Federal preemption, there must be a specific aspect of a Federal performance standard which duplicates a local standard.

Federal preemption cannot be based upon a general purpose of the Act, or the need for national uniformity in the manufactured housing industry. The courts have applied this "aspect of performance" standard in analogous situations by focusing not on the purpose or scope of the Act, but, rather, on the specific requirements of an established Federal standard. If the Federal standard is encompassed or impacted by the State requirement, the State law is preempted.

2. *Superintendence.* It is also possible that a State or local law may be preempted even though the local rule does not meet the differing aspect of performance standard. As stated above, 24 CFR 3282.11(d) sets forth an additional standard of preemption. A State rule must give way if it impairs the Federal superintendence of the manufactured home industry as established by the Act.

Thus, for example, a local requirement that all homes be constructed on site, while not covering any aspect of performance, would be so fundamentally in conflict with the Federal standards as to impair the Federal superintendence of the manufactured home program. Such a requirement would be preempted under the HUD regulations.

The scope of this regulatory provision is limited by the language "as established by the Act". This language limits the Federal superintendence of the industry, since section 604(d)

of the Act limits the preemption of standards to only those issues dealing with the same aspects of performance.

Authority: 42 U.S.C. 3535(d) and 5401 et seq.

Dated: January 14, 1997.

Stephanie A. Smith,

General Deputy, Assistant Secretary for Housing-Federal Housing Commissioner.

[FR Doc. 97-1646 Filed 1-22-97; 8:45 am]

BILLING CODE 4210-27-P

APPENDIX B — HUD STATEMENT OF POLICY

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 3280 and 3282

[Docket No. FR-4223-N-01]

Manufactured Housing: Statement of Policy 1997-1, State and Local Zoning Determinations Involving HUD-Code

AGENCY: Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.

ACTION: Statement of policy.

SUMMARY: This Statement of Policy provides notice to the public concerning HUD's application of the National Manufactured Housing Construction and Safety Standards Act of 1974 (Act) to certain zoning decisions being made by State or local government. These cases typically involve State or local actions to prohibit the siting of HUD-code manufactured housing while permitting the siting of other types of manufactured housing built to State or local building codes.

If a locality is attempting to regulate and even exclude certain manufactured homes through zoning enforcement that is based solely on a construction and safety code different than that prescribed by the Act, the locality is without authority to do so. This Statement of Policy is being provided to clarify and distribute HUD's existing policy determination concerning this matter.

FOR FURTHER INFORMATION CONTACT: David R.

Williamson, Director, Office of Consumer and Regulatory Affairs, Department of Housing and Urban Development, 451 7th St. SW, Room 9152, Washington, D.C. 20410-8000), telephone number (202) 708-6409 (this is not a toll-free number). For hearing-and speech-impaired persons, this number may be accessed via TTY by calling the Federal Information Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

I. Background

Over the last few years, HUD has received a number of questions concerning the application of the Federal preemption authority in the National Manufactured Housing Construction and Safety Standards Act of 1974 (42 U.S.C. 5401-5426) (Act) to actions by State or local government. HUD recently published a nonbinding notice of staff guidance, which it hoped would assist the public on some of these questions (62 FR 3456, January 23, 1997).

In certain cases involving questions of preemption and zoning, the State or local government is imposing more limitations on the placement of manufactured homes that are built to the Federal manufactured home construction and safety standards (24 CFR part 3282) (Federal standards) than on other types of factory-built single family housing. In the past, HUD has sent letters to various communities in such cases, where local zoning laws are in direct conflict with the Federal Act and regulations.

Appendix B

II. Increasing Homeownship and the Supply and Availability of Affordable Housing

The elimination of barriers to the expanded use of affordable housing, including manufactured homes, has been one of the primary objectives of the President's National Homeownership Strategy. HUD coordinates the National Partners in Homeownership, which now has over 60 national organizations participating, including State, county and local governments, and other groups, to identify and promote ways to increase homeownership and the supply of affordable housing. The Strategy includes the following goals and objectives in Action Item 27:

- The partnership should identify and promote zoning and land development policies that are more conducive to manufactured housing. As part of this initiative, partners should develop model legislation for states and localities to adopt that prohibits exclusion of manufactured housing solely on the basis of HUD certification (manufacturer certification that the home has been constructed to the Federal standards).

- The partners also should produce design and land development criteria and guidance materials for use by housing developers and local governments, to facilitate inclusion of manufactured housing in their jurisdictions. To supplement these efforts, the partnership should offer a cooperative program of education and technical assistance to encourage nationwide acceptance of the model legislation within 6 years.

HUD strongly endorses this Action Item, particularly making available sites for manufactured housing outside of parks and largely rural areas. On March 22, 1996, the Manufactured

Housing Institute (MHI) and the American Planning Association (APA) convened a National Partners in Homeownership Forum to discuss zoning and other issues. The Forum drew over 100 attendees including planners, housing-advocacy organizations, and representatives from the manufactured housing industry.

The attendees reached an almost unanimous consensus that very real zoning and other regulatory barriers exist that significantly hinder the full use of manufactured housing. The Forum produced a series of recommendations to HUD and the National Partners in Homeownership, including APA and MHI.

This Statement of Policy is being issued as an initial step toward the elimination of barriers to the use of manufactured housing and in furtherance of the goals and objectives of the National Homeownership Strategy.

III. Requirements of Act and Regulations

Section 604(d) of the Act, 42 U.S.C. 5403(d), states:

> Whenever a Federal manufactured home construction and safety standard established under [the Act] is in effect, no State or political subdivision of a State shall have any authority * * * to establish, * * * with respect to any manufactured home covered, any standard regarding construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the Federal manufactured home construction and safety standard.

The term "manufactured home" is defined in section 603(6)

of the Act, 42 U.S.C. 5402(6). In addition, Sec. 3282.11(d) of the Manufactured Home Procedural and Enforcement Regulations (24 CFR part 3282) prohibits any State or locality from establishing and enforcing rules or taking any action that impairs the Federal superintendence of the manufactured home industry.

Conversely, section 623(a) of the Act (42 U.S.C. 5422(a)) provides:

> Nothing in this [Act] shall prevent any State agency or court from asserting jurisdiction under State law over any manufactured home construction or safety issue with respect to which no Federal manufactured home construction and safety standard has been established. * * *

IV. Statement of Policy 1997-1

Generally, the adoption and enforcement of a local zoning ordinance regulating the location of manufactured homes has not been subjected to the regulatory authority of the Act because such actions are exercises of the locality's authority to determine proper land use. Under section 604(d) of the Act (42 U.S.C. 5403(d)), however, the locality is without authority to regulate or exclude certain manufactured homes through zoning ordinances or enforcement decisions that are based solely on a construction and safety code that is different from the Federal standards prescribed under the Act.

For example, assume two structures are brought into a locality and both structures are: 320 or more square feet when erected on site; built on a permanent chassis; and transported in

one or more sections. If the locality only allows the structure that is built to the State or local building code to be sited outside an approved mobile home park, the locality would be acting without authority. If under the local zoning laws the locality accords the same treatment to all structures that meet the Act's definition of a "Manufactured home" (42 U.S.C. 5402(6)), the locality is not in conflict with the preemptive provisions of the Act.

Therefore, a locality cannot exclude or restrict manufactured homes that meet the Federal standards if the locality accepts manufactured homes meeting other standards. By excluding or restricting only manufactured homes built to the Federal standards and accepting manufactured homes built to State or local codes, the locality is establishing standards for manufactured homes that are different from the Federal standards. To the extent that the provisions or enforcement of local zoning regulations require that manufactured homes meet standards other that the Federal standards for manufactured homes, those local actions are preempted by section 604(d) of the Act (42 U.S.C. 5403(d)). Furthermore, such a system of local regulation and enforcement would interfere with Federal superintendence of the manufactured home industry, in contravention of 24 CFR 3282.11(d).

Dated: April 24, 1997

Nicolas P. Retsinas,

Assistant Secretary for Housing-
Federal Housing Commissioner

[FR Doc. 97-11535 Filed 5-2-97; 8:45 am]

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